Supreme Court, U.S.
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No. 85-465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS; MR. & MRS. HUGH A. GROVES; FRANCIS SEELY; ESTELLE WHITTLE; HENRY WHITTLE; MR. & MRS. BURTON W. ATKINSON; MR. & MRS. C. E. DIETRICH; HARRIET MILLER: and ALICE VAN LANDINGHAM,

Petitioners,

v.

NATHAN MALCHMAN, GERTA CONWAY, WILLIAM DEAUTRIELL, LOUIS STONE,

and

LEONARD DAVIS, SOPHIE DAVIS, COLONIAL PENN GROUP, INC., COLONIAL PENN FRANKLIN INSURANCE COMPANY, INTRAMERICA LIFE INSURANCE COMPANY, NATIONAL ASSOCIATION PLANS, INC., AMERICAN ASSOCIATION OF RETIRED PERSONS, NATIONAL RETIRED TEACHERS ASSOCIATION, CARRIE B. ALLEN, ORANDA BANGSBERG, BERNARD BERGGREN, JUNE BIGGAR, ARTHUR BOUTON, OLAF KAASA, CLARA L. KLEWENO, FLOYD E. TUMBLESON J. LEONARD JOHNSON, C.E. CARMICHAEL, AMERICAN ASSOCIATION OF RETIRED PERSONS INSURANCE TRUST, DOROTHY M. CRIPPEN, JAMES J. BROWNING, LLOYD I. SINGER, CYRIL F. BRICKFIELD and JOHN J. MacWILLIAMS,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

This Court's April 21, 1986 decision in *Evans v. Jeff D.* ___ U.S. ___ (No. 84-1288) holds that a negotiated waiver of attorneys fees (1) does not violate counsel's ethical obligation to his client (Slip Op. 9); (2) is not prohibited by statutory fee authorizations (*id.* 18-19); and (3)

does not, in the context of a class action, *ipso facto,* require judicial disapproval pursuant to F.R.C.P. Rule 23(e) in order to protect the interests of absent class members (*id.* 22-24). The decision does not address the issue presented by this case which is whether class counsel can – consistent with Rule 23, F.R.C.P. , and the due process clause – agree to waive and extinguish any and all claims for damages by the class of 11.2 million members while simultaneously obtaining Defendants' agreement not to oppose an award of costs and attorneys fees of $2,325,000. Here, rather than trading off *their* right to a fee for more relief to their clients, counsel have traded the *class' right* to monetary relief for their own fee. Unlike *Jeff D.*, this case presents questions of profound concern both as to class counsel's ethical obligations to their clients and the trial court's duty under Rule 23 to act as guardian for the interests of absent class members.

Nor does this Court's decision in *Jeff. D.* resolve the conflict between the decision below and the decisions of other circuits (a) disqualifying persons from serving as class representatives who have familial and close personal relationships with class counsel: *Susman v. Lincoln Am. Corp.,* 561 F.2d 86 (7th Cir. 1977); *Turoff v. May Co.,* 531 F.2d 1357 (6th Cir. 1976); *Shroder v. Suburban Coastal Corp.,* 729 F.2d 1371 (11th Cir. 1984); (b) holding that objectors are entitled to conduct discovery and to participate in an evidentiary hearing regarding the fairness of any class action settlement: *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1131 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979); *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); *Greenfield v. Villager Industries, Inc.,* 483 F.2d 824 (3d Cir. 1973); *Cohen v. Young,* 127

F.2d 721, 724 (6th Cir. 1942), *cert. denied,* 321 U.S. 778 (1944); and (c) suggesting that tentative class certification for settlement purposes be sparingly, if ever, used. *In re Beef Industry Antitrust Litigation,* 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied,* 452 U.S. 905 (1981). See also *Manual for Complex Litigation* §1.46 (rev. ed. 1981).

The Court's apparent approval of simultaneous negotiations involving attorneys fees and merits issues in *Jeff D.* — in the context of a fee waiver — accentuates and heightens the need to resolve these circuit conflicts presented by this Petition.

Respectfully submitted,

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April 24, 1986